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UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil 73-60

[Filed Oct. 7, 1952]

NEWTEX STEAMSHIP CORPORATION AND SEATRAIN LINES, INCORPORATED,
Plaintiffs-Appellants,

against

UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellee.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, plaintiffs-appellants, Newtex Steamship Corporation and Seatrain Lines, Incorporated, submit herewith their statement, particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the Final Judgment of the District Court, entered in this cause on October 3d, 1952. The Petition for Appeal is filed herewith.

Statutory Provisions Sustaining Jurisdiction

The jurisdiction of the Supreme Court of the United States to review by direct appeal the judgment and decree complained of is conferred by 28 U. S. Code, Sections 1253 and 2101 (b), relating to direct appeals from decisions of three-judge courts in suits to set aside, in whole or in part, orders of the Interstate Commerce Commission.

Statute Involved

The statutory provision involved is Section 309(c) of the Interstate Commerce Act, Title 49, U. S. Code, Section 909(c), which provides as follows:

> "• • • Upon application as provided in this section the Commission shall issue a certificate to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if the Commission finds that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this charter and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied."

The Issue

The single question presented for decision is, whether the order and report of the Interstate Commerce Commission encompass the ultimate findings required by statute, founded upon adequate basic or evidentiary findings which are in turn supported by substantial evidence in the record.

Nature of the Case and Rulings Below

By an application filed April 3, 1950, as amended, in Docket No. W-376, Sub. No. 10, Pan-Atlantic Steamship Corporation, a common carrier by water, in interstate and foreign commerce, with principal office at No. 61 St. Josephs Street, Mobile, Alabama, sought authority from the Interstate Commerce Commission to transport commodities generally, and passengers, between Galveston and Houston, Texas, on the one hand, and the other sea and gulf ports on the other hand.

Hearings were conducted as required by law, at which hearings various water carriers, rail carriers, Chambers of Commerce and Boards of Trade, as well as shippers and receivers of freight, appeared in opposition to the application as aforesaid, including the plaintiffs-appellants herein. Thereafter, and on or about August 9, 1951, a report and order were made by the Interstate Commerce Commission by a two to one decision, pursuant to which it was found that Pan-Atlantic Steamship Corporation was entitled to a certificate, as a common carrier by water. This order of August 9, 1951 provided for the effective date of the Certificate of Public Convenience issued to the applicant in the proceeding before the Interstate Commerce Commission to become effective in November, 1951. Upon application of the plaintiffs-appellants to reopen and review the order of August 9, 1951, the review was denied by the Commission, but the effective date of the order was extended to January 31, 1952. An application by the plaintiffs-appellants to extend the effective date of the order beyond January 31, 1952 was denied by the Commission on January 24, 1952. Thereafter, and on or about the 29th day of January, 1952 the plaintiffs-appellants obtained from the United States District Court for the Southern District of New York an order granting the plaintiffs-appellants an interlocutory injunction enjoining, staying and suspending during the pendency of the action before a statutory court to be constituted to review the order of the Interstate Commerce Commission, the operation of the order made by the Interstate Commerce Commission effective January 31, 1952. The case was heard on June 12, 1952 before a three-judge court convened pursuant to the provisions of Title 28, U.S. Code, Sections 1336, 2325 and 2284.

On September 11, 1952 the District Court, with one judge dissenting, rendered its opinion denying the injunction

sought by plaintiffs-appellants and dismissing the complaint, having determined that the order of the Interstate Commerce Commission was properly issued. The District Court's Judgment and Decree was entered on October 3d, 1952. Copies of the majority decision of the District Court is appended hereto, marked "Appendix A;" a copy of the minority decision of the District Court is appended hereto, marked "Appendix B;".

The Question Presented Is Substantial

The question presented by this appeal is substantial.

The three-judge District Court has decided an important question involving the construction of a federal statute, enacted in the public interest. The question involves the deprivation of the property interests of the plaintiffs-appellants and contravenes the avowed public policy of encouraging a national maritime service. As has been pointed out by them throughout every stage of this proceeding, and as is indicated in the evidence submitted before the Interstate Commerce Commission, the issuance of the authority to the defendant-appellee, Pan-Atlantic Steamship Corporation, will result in the possible forced retirement of the plaintiffs-appellants from the coastwise carrier service. This result will have with it its corollary consequence of depriving this nation of one of its common carriers in an industry which has been avowed to be essential to the public interest. Further, the question has been determined by the District Court in a way probably not in accord with applicable decisions of the Supreme Court, and in conflict with basic Congressional intent in providing the legislation embodied in Section 309(c) of the Interstate Commerce Act. In addition, the substantiality of the questions is clearly manifested by the dissenting opinions presented, both by the Interstate Commerce Commission and a member of the three-man statutory court.

The issue presented on this appeal has been set forth above in substantially the words of the majority decision. No quarrel is found with the correctness of this statement of the issue. However, the correctness of its conclusions are vigorously questioned.

The basic question involved is whether the Commission in arriving at its ultimate conclusion made the same on the proper basic findings founded upon substantial evidence in the record before it. The dissenting opinion would strongly indicate that the methods by which the Commission arrived at its conclusion were not in accord with either legislative intent, or the letter and spirit of the statute.

It should be noted that the dissenting opinion of McGohey, D. J. held that the Commission's conclusion was not supported as it is required to be, by the basic findings which the Commission has made. As stated by Judge McGohey, "these findings clearly show that 'present' public convenience and necessity do not require 'the proposed operation by applicant.' Just as clearly, I think they show that 'future' public convenience and necessity will not require it, * * *."

In the absence of such basic findings it is well settled that an order of the Commission will be held invalid.

Alabama Great Southern Railway Co. v. *United States*, 340 U. S. 216, 228;

Florida v. *United States*, 282 U. S. 194.

The record of the proceedings before the Interstate Commerce Commission is replete with evidence adduced by the plaintiffs-appellants that the proposed new operation would not serve a useful public service; was not and would not be responsive to a public demand or need; that the purpose sought to be served by the proposed service could be and was being served as well by existing lines or carriers; and that the applicant's proposed service could not

be operated without endangering or impairing the operations of existing carriers, contrary to the public interest. The basic and prerequisite evidenciary findings, necessary to sustain the ultimate conclusion that there exists public convenience and necessity for a proposed new service, include the determination of the adequacy or inadequacy of existing service. Not only did the Commission fail and refuse to find that the existing service is inadequate, but as a matter of fact, it found to the contrary in its order of August 9, 1951.

The lack of evidence to support the Commission's finding that future public convenience and necessity would be served is indicated in the dissenting decision of Judge McGohey, wherein in characterizing the testimony in this respect, he states:

> "In context it seems to me to mean only that Pan-Atlantic's 'solicitation program' will produce 'substantial traffic volume' for itself. This, of course, could be accomplished by merely taking over the traffic now handled by Newtex and thus driving it out of business;—a result which I understand the Commission to hold, 'would be unwarranted.'"

The failure of the Commission to reach its conclusion upon the basic findings supported by substantial evidence, as is required by law, is apparently well recognized by the majority decision which is impelled to indulge in speculation and the drawing of inferences from negative facts, and even lack of evidence in the record, to justify such conclusions. A finding of fitness and willingness is arrived at, although based upon the consideration by the Commission of evidence that the defendant-appellee, Pan-Atlantic Steamship Corporation was possessed of a great many certificates of authority which it had failed to exercise. As argued by the majority decision "though phrased negatively, the state-

ment is nevertheless a finding of fitness and ability, if not upon its face, then at least by reasonable implication, and certainly when read in context."

It would appear apparent from the facts above set forth that the question involved on this appeal is substantial and concerns not only the property rights of the plaintiffs-appellants, which are recognized and safeguarded by legislative and constitutional provisions, but in addition, involves a vital national interest.

Respectfully submitted,

MANES, STURIM, DONOVAN & LAUFER,
S. S. EISEN,
BY: JOHN J. DONOVAN, JR.
Attorneys for Plaintiffs-Appellants.

"APPENDIX A"

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civ. 73-60

NEWTEX STEAMSHIP CORPORATION AND SEATRAIN LINES, INCORPORATED, *Plaintiff*,

against

UNITED STATES OF AMERICA, ET AL., *Defendant*

APPEARANCES:

John J. Donovan, Jr., Esq., 70 Pine Street, N. Y., N. Y., S. S. Eisen, Esq., 140 Cedar Street, N. Y., N. Y., Attorneys for Plaintiffs.

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Allen Cranshaw, Esq., Washington, D. C., Daniel W. Knowlton, Esq., of Counsel, Attorney for Defendant Intervenor, Interstate Commerce Commission.

Kirlin, Campbell & Keating, Esqs., 120 Broadway, N. Y., N. Y., Warren Price, Jr., Esq., 1729 H Street, N.W., Wash., D. C., Attorneys for Defendant Intervenor, Pan-Atlantic Steamship Corporation.

Kirlin, Campbell & Keating, Esqs., 120 Broadway, N. Y., N. Y., Fulbright, Crooker, Freeman & White, Esqs., 638 Transportation Building, Washington, D. C., Attorneys for Defendant Intervenors Atlantic Sales Corporation, Frankfort Distilleries, Incorporated, Magnolia Petroleum Company and Magnolia Pipe Line Company, Phelps Dodge Corporation, Converted Rice, Inc., The Sherwin-Williams Co., Congoleum-Nairn Inc., Lone Star Bag and Bagging Co., Sears, Roebuck & Company, Harris County Houston Ship Channel Navigation District, Houston, Texas, the City of Galveston, and the Board of Commissioners of the Galveston Wharves.

Before: SWAN, Chief Judge Court of Appeals, MCGOHEY, and EDELSTEIN, District Judges

EDELSTEIN, District Judge:

This is an action by two certificated water carriers, Newtex Steamship Corporation and Seatrain Lines, Inc., to set aside and enjoin an order of the Intrastate Commerce Commission, dated August 9, 1951, whereby prior authority of the applicant Pan-Atlantic Steamship Corporation is amended to authorize it to extend its inland water operations to include the transportation of freight and passengers between specified Atlantic and Gulf ports and the ports of Houston and Galveston, Texas. Jurisdiction is invoked under the provisions of Title 28, U. S. Code, SS. 1336, 1398, 2284 and 2321 to 2325 inclusive. The Interstate Commerce Commission, the applicant Pan-Atlantic, representatives of the ports of Houston and Galveston and a number of shippers were granted leave to intervene as defendants.[1]

After extensive hearings had been held before an Examiner, the issues were argued before Division 4 of the Commission which, with one Commissioner dissenting, issued its report and order granting the application.[2] The issues before the court, severely narrowed by the limited scope of its review[3] of an order of the Interstate Commerce Commission, is merely whether the order and report of the Commission encompass the ultimate findings required by statute,

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[1] The Harris County Houston Ship Channel Navigation District, Houston, Texas (a political subdivision of the State of Texas); the City of Galveston, Texas; the Board of Commissioners of the Galveston Wharves; The Atlantic Sales Corporation; Frankfort Distilleries, Inc.; Magnolia Petroleum Co. and Magnolia Pipe Line Co.; Phelps Dodge Corp.; Converted Rice, Inc.; The Sherwin-Williams Co., Congoleum-Nairn, Inc.; Lone Star Bag and Bagging Co.; Sears, Roebuck & Co.

[2] A petition for reopening and reconsidering was argued before the entire Commission and was denied, with two Commissioners dissenting. A subsequent petition for reopening and for a further hearing to receive proof of the discontinuation of services by the applicant was likewise denied.

[3] *Alabama Great Southern Railroad Co.* v. *United States*, 340 U.S. 216; *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515; *United States* v. *Detroit Navigation Co.*, 326 U.S. 236; *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60.

founded upon adequate basic or evidentiary findings which are in turn supported by substantial evidence in the record. The gravamen of the complaint is that, upon its face, the report is fatally defective because basic findings were made and established by the evidence which do not support the ultimate conclusion. We find no merit in this position.

The ultimate findings required by law [4] are that (1) "The applicant is fit, willing and able properly to perform the service proposed," and (2) "The proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity." These findings were explicitly made in terms of the statutory language, and an examination of the report discloses that they are rationally supported by adequate basic findings, which are supported by substantial evidence.

In examining the report we bear in mind that the Commission is not required to make formal or detailed findings of fact.[5] It has not done so; on the contrary, its findings are quite informally incorporated in a discussion of a technical transportation problem, and co-mingled with factual summary, statement of issue and exposition and evaluation of conflicting evidence. A piece-meal, hypercritical reading to extract the requisite findings, while it can be done, may lead to the dangerous possibility of distorting the meaning otherwise conveyed by words not divorced from the significance lent by context. In the use of words to express thought, if the whole is not greater than the sum of its parts, at least the true significance of the separate parts is a relative matter, to be determined only after a consideration of the whole. It is not meant, however, that findings may be undiscernable, vague or non-existent, abdicating their function to some generalized impression said to be conveyed by the whole report. The question is whether "the essential basis of (the Commission's) judgment is sufficiently disclosed in its report" and whether " 'the report read as a

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[4] Part III of the Interstate Commerce Act, Sec. 309(e), 49 U.S.C. S. 909(e).

[5] Except in a case where damages are awarded. Part III of the Interstate Commerce Act, S. 316(e), 49 U.S.C. S. 916(e); *Alabama* v. *Great Southern Railroad Co.* v. *United States*, supra, p. 227.

whole sufficiently expresses the conclusion of the Commission, based upon supporting data " " ". *Alabama Great Southern R. Co. v. United States*, 240 U. S. 216, 228. Reading the report as a whole, we think that the essential findings clearly appear.

The basic finding on fitness, willingness and ability sets forth the applicant's adequacy of financial position, equipment, facilities, experienced personnel and record of past operations in the coastwise trade, and there is an abundance of supporting evidence in the record. It is urged, however, that no finding of fitness and willingness, as distinguished from ability, has been made, and that upon the record such a finding would be unwarranted, because the applicant holds a large number of authorities which it does not exercise, in violation of its certificate which is conditioned upon the exercise of the authority specified. The Commission considered this argument but found that it did "not require the finding that the applicant is not fit and willing to perform the operations for which it here seeks authority." Though phrased negatively, the statement is nevertheless a finding of fitness and ability, if not upon its face, then at least by reasonable implication, and certainly when read in context. Nor is this finding precluded by the record. A failure to perform services in the past does not compel a logical inference that there will be a similar failure to perform a different service in the future. A favorable reference to the applicant's past operations and to the increasing patronage of its existing service as the result of a vigorous solicitation program discloses the evidence upon which the Commission rejected the contention that Pan-Atlantic would sacrifice public service to the profit of expedient operation. The nature of the issue in a specialized field, and the decision of the expert body may not be disturbed when based upon such evidence.

Plaintiffs argue that the ultimate finding of public convenience and necessity is arbitrarily and illegally based upon evidentiary findings that (1) the existing service is adequate, and (2) the proposed service cannot be operated without endangering or impairing the operations of existing carriers contrary to the public interest. A reading of

the report discloses no such findings. After an extensive factual exposition, the report proceeds to "Discussion and Conclusions" centered about two principal issues: whether the existing service is adequate and whether there is room for another carrier in the trade. The "Discussion and Conclusions" is in the nature of a general evaluation of relevant considerations for and against the application, and the "findings" urged by plaintiffs are no more than pieces of the discussion surgically dissected from context. That the Commission found the existing service inadequate is clear.

In the section of the report largely devoted to a summary of evidence, the Newtex service was described as "scant", with the "hampering effect of such limited service" being aggravated "by the repeated failure of Newtex vessels to sail on schedule and by the numerous outright cancellations of sailings where the available tonnage was considered insufficient to warrant dispatch of the vessel." Under the heading of "Discussion and Conclusions" the report concludes that, after disregarding certain vulnerable criticisms of existing service, "there remains substantial evidence that protestants' services do not fully meet the needs of shippers and that the extension of applicant's operations as proposed would improve the situation." A piece-meal approach might incur some confusion upon reading the sentence immediately following, that "On the other hand, patrons of protestants who oppose the application vouch for the adequacy of the existing services to meet their needs in all respects." But an evaluation of the entire discussion in context discloses the significance of this sentence as merely a statement of contrary evidence in no way detracting from the finding of inadequate service. For there follows a further consideration of the irregularity of the Newtex service, and the statement that Seatrain "too fails to meet the needs of the shippers here concerned" because of a tendency toward "selectivity" in offering no accommodations for shippers of less-than-carload lots. Finally, relating to a consideration of the issue earlier in the report, it is set forth that shippers at or adjacent to ports other than New York are entitled to service through the ports to which they are logically tributary, a plain implication of a finding of the inadequacy of the existing service.

The discussion of whether there is room in the trade for another carrier is based upon an evaluation of the prospect of the development of new business. It is indicated that on the basis only of present tonnage, an additional line in the trade is unwarranted, and "Unless a substantially larger overall volume of coastwise tonnage can be developed, extension of applicant's operations probably would force Newtex into a deficit and conceivably retirement from the trade." Plaintiffs apparently start with this sentence, which they label a "finding" and fine-comb the subsequent language for a finding that a "substantially larger" volume will be developed. Failing to discover a finding in such language, they insist that the Commission has found that Newtex will be forced into a possible retirement from the trade, upon allowance of the application. We do not so read the report. The discussion clearly discloses a judgment that the condition required will be met. After indicating that the potential tonnage had not declined proportionately to the ratio borne by the existing tonnage to the much greater pre-war tonnage, it was concluded that "the volume presently moving in this trade is not to be regarded as the maximum available for coastwise transportation."

The addition of a vessel to the service by Seatrain, operating at or near capacity, is point out as demonstrating the availability of "more business." It was found that "a breakbulk line providing regular, dependable and reasonably frequent sailings will engender confidence and reliance upon coastwise service and attract additional traffic." This view is supported by reference to the increasing patronage of Pan-Atlantic's existing service. Isolating these statements from context, and, labeled as "findings", considering them cumulatively, we are constrained to hold that theCommission has sufficiently conveyed the idea that enough business will be developed to preclude Newtex's retirement from the trade.[6] Considering the statements in context, that conclusion is inescapable. To draw a contrary conclusion, in

[6] The dissenting Commissioner thought that the evidence concerning the anticipated new tonnage was not sufficiently definite to warrant the granting of the application. The Court upon review may not thus weight the evidence. But from the dissent it is evident that the finding

the light of the report, would be to indulge in a presumption that the Commission disregarded the public interest. Cf., *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515. The worst that can be said is that in the part of the discussion following the posing of the problem, the Commission did not introduce, with reference to its consideration of the development of additional traffic, the word "substantially", in order to balance the verbal equation with mathematical precision. But if such nicety of equivalence is required, it can be spelled out. For it was found that where existing service possesses the irregularity attributed to that of Newtex, "an increase in the frequency of service reasonably may be expected to increase the volume of traffic in greater measure than the proportionate increase in frequency of service." Such an increase in the volume of traffic resulting from the proposed service can reasonably be described as a "substantially larger" volume.

It is apparent that the plaintiffs' essential position is not that basic findings were made upon substantial evidence which are inconsistent with the ultimate conclusions, but that the basic findings made are precluded by the evidence. So stated, the problem upon review is merely whether there is substantial evidence to support the basic findings. Except for a finding on passenger service, the report itself indicates the evidence contained in the record which supports the findings made, and the existence of which is sufficient to exhaust the function of the reviewing court. However, we discover no evidence to support a finding leading to the conclusion that Pan-Atlantic be permitted to undertake a passenger service. But this is an injunction proceeding, and an injunction will issue only when it is necessary for the adequate protection of a plaintiff's rights.[7] Plaintiffs

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of the majority of Division 4 is that "sufficient" new tonnage would be developed, the difference of opinion being on the weight of the evidence supporting the finding made.

[7] "Suitors may not resort to a court of equity to restrain a threatened act merely because it is illegal or transcends constitutional powers. They must show that the act complained of will inflict upon them some irreparable injury." *United Fuel Gas Co.* v. *R.R. Commission*, 278 U.S. 300, 310.

here have in no way indicated that their rights will be prejudiced by permitting Pan-Atlantic the authority to carry passengers in the Atlantic-Texas service. Accordingly, they have no standing to seek an injunction on that score.

The injunctive relief will be denied and the complaint dismissed.

Dated: 9/11/52

(S.) David N. Edelstein,
United States District Judge.

I Concur

(S.) Thomas W. Swan, C. J.,
Chief Judge, U.S.C.A.

9/11/52

"APPENDIX B"

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

Civ. 73-60

Newtex Steamship Corporation and Seatrain Lines, Incorporated, *Plaintiffs,*

against

United States of America, et al., *Defendants*

Before: Swan, Chief Judge, Court of Appeals, McGohey, District Judge, Edelstein, District Judge, McGohey, D. J. (Dissenting)

In my opinion the Commission's conclusion "that the present and future public convenience and necessity require the proposed operation by applicant" (Pan-Atlantic) is not supported as it is required to be[1] by the basic findings which the Commission has made.

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[1] *Florida* v. *U.S.*, 282 U.S. 194.

The Commission has found:

(a) "Considering only the volume of coastwise tonnage currently moving to and from Texas, an additional line in this trade clearly would be unwarranted"

(b) "a break-bulk service paralleling that now provided by Newtex may be expected to divert a part of the traffic now moving by that line"

(c) Newtex had "substantial deficits" in 1947 and 1948. It had "modest profits" in 1949 and 1950.

(d) "unless a substantially larger overall volume of coastwise tonnage can be developed, extension of applicant's (Pan-Atlantic's) operations probably would force Newtex into a deficit and conceivably retirement from the trade."

These findings clearly show that "present" public convenience and necessity do not require "the proposed operation by applicant." Just as clearly, I think, they show that "future" public convenience and necessity will not require it, "unless a substantially larger overall volume of coastwise tonnage can be developed," which will be sufficient to insure that Newtex will not be forced "into a deficit and conceivably retirement from the trade." This, then, is the Commission's standard for determining "future" public convenience and necessity in this case. Accordingly, the conclusion reached would be warranted only if the Commission found that the new operation would develop or would, at least, be likely to develop tonnage sufficient to meet this standard.

The only finds as to the future that I am able to discover are these:

1. "that protestants' services do not fully meet the needs of shippers and that extension of applicant's operations as proposed *would improve the situation;*" (emphasis supplied)

2. that "a break-bulk line providing regular dependable and reasonably frequent sailings will . . . attract *additional* traffic." (emphasis supplied)

3. that "a vigorous solicitation program will aid materially in building up substantial traffic volume."

This last finding is based on the testimony of Pan-Atlantic's representative. In context it seems to me to mean only that Pan-Atlantic's "solicitation program" will produce "substantial traffic volume" for itself. This, of course, could be accomplished by merely taking over the traffic now handled by Newtex and thus driving it out of business;—a result which I understand the Commission to hold "would be unwarranted."

These findings, which I think fall far short of the Commission's standard, do not support its ultimate conclusion.

I would reverse the order.

Dated: New York, N. Y.
Sept. 15th, 1952

(S.) JOHN F. X. MCGOHEY,
U. S. D. J.

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil No. 73-60

NEWTEX STEAMSHIP CORPORATION AND SEATRAIN LINES, INCORPORATED, *Plaintiffs*

v.

UNITED STATE OF AMERICA, ET AL., *Defendants.*

MOTION TO AFFIRM

Appellees, United States of America and Interstate Commerce Commission, pursuant to paragraph 3 of Rule 12 of the Revised Rules of this Court, move that the judgment of the district court be affirmed.

This is a direct appeal from the final judgment entered on October 3, 1952, by a district court of three judges constituted pursuant to 28 U.S.C. 2284 and 2325, dismissing an action to set aside an order of the Interstate Commerce Commission. The appeal was allowed on October 6, 1952, and the appeal papers were served on October 10, 1952.

Appellants are two water carriers authorized by the Interstate Commerce Commisson to engage in transportation of property between points along the Atlantic and Gulf coasts of the United States. The order of the Commission which appellants sought to have set aside granted to Pan-Atlantic Steamship Corporation, a competing common carrier by water, authority to serve Houston and Galveston, Texas, as an extension of its previously authorized operations between specified Atlantic and Gulf ports. The basic question which the appeal presents, as phrased in appellant's jurisdictional statement, is "whether the Commission in arriving at its ultimate conclusion made the same on the proper basic findings founded upon substantial evidence in the record before it."

The contested order of the Commission was issued pursuant to Section 309(c) of the Interstate Commerce Act, 49 U.S.C. 909(c). This section provides, so far as pertinent, that, upon application to the Commission for a certificate of public convenience and necessity to engage in transportation as a common carrier by water, the Commission may issue a certificate if it "finds that the applicant is fit, willing, and able properly to perform the service proposed * * * and that the proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity." The Commission explicitly made both of these requisite

findings. See *Pan-Atlantic Steamship Corporation Extension—Houston,* 285 I.C.C. 33, 50. And the district court held that these ultimate findings were "rationally supported by adequate basic findings" which had "substantial" evidentiary support.

It is settled that the Interstate Commerce Act does not require the Commission to make detailed findings of fact except in a case where damages are awarded and that the statute requires only that the Commission's report sufficiently disclose "the essential basis of its judgment." Alabama *Great Southern R.R.* v. *United States,* 340 U.S. 216, 227-228. In the present case the district court held that the Commission's report fully satisfies this test.

On the question of the applicant's fitness, willingness and ability, the Commission made findings with reference to adequacy of its financial position, equipment, facilities, experience and personnel (285 I.C.C. 33, 50; see also *id.,* 34-35). It also found that the applicant had shown "the ability to develop traffic to and from the Texas ports" (*id.,* 42). The Commission noted that the applicant had not performed all the service for which it had operating authority, but concluded that this circumstance "does not require the finding that applicant is not fit and willing to perform the operations for which it here seeks authority" (*id.,* 35-36). This was certainly a reasonable exer-

cise of administrative judgment since the applicant's failure fully to utilize its existing operating authority does not establish its unwillingness to perform the new service for which it sought operating authority. In this connection, the Commission was warranted in giving weight to the substantial and progressive increase in tonnage handled by the applicant in the post-war period (*id.*, 42).

The finding that public convenience and necessity requires the additional service authorized by the Commission's order was also supported by adequate basic findings which rested on substantial evidence. The Commission found that the service which had been rendered by the appellants was inadequate (285 I.C.C. 33, 46). It found that the service of appellant Seatrain Lines, Inc. does not meet the needs of shippers and receivers of goods which move in less-than-carload lots (*ibid.*). It found that shippers criticized the service of appellant Newtex Steamship Corporation upon the grounds that its sailings were "too infrequent" and "not regular," and that "its schedules are undependable" (*ibid.*). It found that Newtex provided "rather scant service" for certain ports and that "the hampering effects of such limited service has been aggravated by the repeated failure of Newtex vessels to sail on schedule and by the numerous outright cancellations of sailings" (*ibid.*).

On the question whether there was "room in the trade for another carrier" adequate subsidiary findings were made. The Commission found that in 1939 Houston had a population of 384,000 and nine coastwise sailings per week, while in 1950 it had a population of 594,000 but the coastwise service was limited to one sailing per week southbound and one sailing every two weeks northbound, although the rail traffic received and forwarded at Houston had risen from 6,000,000 tons in 1939 to 14,800,000 tons in 1949 (285 I.C.C. 33, 43). The Commission concluded that while prewar tonnage cannot be regarded as a true measure of the present traffic potential, that potential had not declined in the same proportion as the decline in coastwise service (*id.*, 49). It further found that appellant Seatrain's capacity or near capacity operations and its plan to put another vessel into operation showed that "more business is available or can be developed" (*ibid.*). It found, on the basis of the testimony of a number of shippers, that "a break-bulk line providing regular, dependable, and reasonable frequent sailings will engender confidence and reliance upon coastwise service and attract additional traffic" (*ibid.*). It also noted that the applicant's proposed service would result in service to the Texas ports by three water carriers as compared with eight prior to the war (*ibid.*).

As to the widespread view by trade and shipper organizations that there was public need for the proposed additional service and traffic available therefor, the Commission stated (285 I.C.C. 33, 42-43):

> Applicant's contentions with respect to the availability of traffic within the affected area and the public need for additional break-bulk water service are supported by the Boston Port Authority, Chamber of Commerce of Philadelphia, Rochester Chamber of Commerce, Shippers' Conference of Greater New York, Associated Industries of New York State, Inc., Houston Port and Traffic Bureau, Inc., Houston Chamber of Commerce, Galveston Cotton Exchange and Board of Trade, Galveston Chamber of Commerce, Board of Trustees of the Galveston Wharves, Fort Worth Chamber of Commerce, Fort Worth Grain & Cotton Exchange, Southwestern Peanut Shellers Association, Texas Cotton Seed Crushers Association, Texas Industrial Traffic League, and other shipper groups and individual shippers.

To the extent that the appeal attacks the Commission's order upon the ground that its findings are contrary to the weight of the evidence, the district court correctly held that the function of a reviewing court is to determine whether there is

"substantial evidence to support the basic findings." The court pointedly observed that the evidence referred to in the Commission report constitutes in itself substantial supporting evidence for its basic findings. Appellants have set forth nothing which would indicate error in the court's conclusion.

For the foregoing reasons, it is evident that this appeal presents no substantial question. It is therefore respectfully submitted that the judgment of the district court should be affirmed.

ROBERT L. STERN,
Acting Solicitor General.

EDWARD M. REIDY,
Chief Counsel,
Interstate Commerce Commission.

October 1952.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 458

NEWTEX STEAMSHIP CORPORATION AND SEATRAIN LINES, INCORPORATED,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT BY APPELLEE, PAN-ATLANTIC STEAMSHIP CORPORATION, IN SUPPORT OF MOTION TO AFFIRM.

HAROLD B. FINN,
WARREN PRICE, JR.,
Counsel for Appellees.

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil No. 73-60

NEWTEX STEAMSHIP CORPORATION AND SEATRAIN LINES, INCORPORATED,

Plaintiffs,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants

STATEMENT BY APPELLEE, PAN-ATLANTIC STEAMSHIP CORPORATION, IN SUPPORT OF MOTION TO AFFIRM BY UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

Comes now appellee, Pan-Atlantic Steamship Corporation, and files this its memorandum in support of Motion to Affirm the judgment of the district court, filed by United States of America and Interstate Commerce Commission. Pan-Atlantic Steamship Corporation is the carrier which is permitted by the Interstate Commerce Commission order here under attack to extend its previously authorized operations to the ports of Houston and Galveston, Texas.

In support of the aforesaid motion, appellee shows:

The Essential Position of Appellants Is Untenable

The district court found that

> "It is apparent that the plaintiffs' essential position is not that basic findings were made upon substantial evidence which are inconsistent with the ultimate conclusions, but that the basic findings made are precluded by the evidence. So stated, the problem upon review is merely whether there is substantial evidence to support the basic findings."

The appellants state in their jurisdictional statement that

> "The record of the proceeding before the Interstate Commerce Commission is replete with evidence adduced by the plaintiffs-appellants that the proposed new operation would not serve a useful public service; was not and would not be responsive to a public demand or need; that the purpose sought to be served by the proposed service could be and was being served as well by existing lines or carriers; and that the applicant's proposed service could not be operated without endangering or impairing the operations of existing carriers, contrary to the public interest."

The fact that appellants have included the foregoing in their jurisdictional statement indicates that they are proceeding under a basic misconception of the duties and functions of the courts in reviewing reports and orders of the Interstate Commerce Commission. Numerous decisions of the Supreme Court hold that it is the function of courts reviewing Commission decisions not to weigh the evidence that was before the Commission in proceedings brought to their attention, but to determine whether or not there was substantial evidence to support the Commission's ultimate

findings and conclusions. As the district court found, there was substantial evidence, specifically recited in the Commission's report, to support findings directly contrary to those urged with respect to each of the points referred to by appellants in the above quoted statement. Assuming *arguendo* that there was also evidence before the Commission to support the positions of appellants with respect to these points (which appellee unequivocally denies), the fact remains that it is not the function of the courts to weigh the conflicting evidence and determine which is the stronger. As the Supreme Court stated in *Claiborne-Annapolis Ferry Company* v. *United States*, 285 U. S. 382, 392,

> "We think there was enough evidence—*when material and conflicting we may not pass upon its weight*—to support the Commission's conclusion." (Emphasis added.)

In *Virginian R. Co.* v. *U. S.*, 272 U. S. 658, the court said, at page 663:

> "To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province."

In *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, the court pointed out that it had theretofore "ascribed" to the findings of the Commission "the strength due to the judgment of a tribunal appointed by law and informed by experience," and also that in recognition of the Commission's expertise the court was led not to bind the Commission to common law evidential and procedural fetters. It then proceeded to summarize the limitations on

court review, as evolved from its previous rulings, as follows (p. 139):

> "From these general considerations the court evolved two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 51 L. ed. 553, 27 S. Ct. 350, 9 Ann. Cas. 1075. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked. The other is the *doctrine of administrative finality.* Even when resort to courts can be had to review a commission's order, *the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied the Commission's order becomes incontestable.* Interstate Commerce Commission v. Illinois C. R. Co., 215 U. S. 452, 470, 54 L. ed. 280, 287, 30 S. Ct. 155; Interstate Commerce Commission v. Union P. R. Co., 222 U. S. 541, 56 L. ed. 308, 32 S. Ct. 108." (Emphasis added.)

Similarly, in *Interstate Commerce Commission* v. *Illinois C. R. Co.*, 215 U. S. 452, the court declined to substitute its judgment for that of the Commission or to pass upon the expediency or the wisdom of the Commission's order there involved. At page 470 of this decision, the following appears:

> "Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative

order upon our conception as to whether the administrative power has been wisely exercised.

"Power to make the order, and not the mere expediency or wisdom of having made it, is the question."

The district court, in refusing to weigh the evidence before the Interstate Commerce Commission and in refusing to substitute its judgment for that of the Commission, acted within the proper scope and limitations of its judicial authority.

As the District Court Found, the Report of the Interstate Commerce Commission Read as a Whole Clearly Expresses the Essential Findings Necessary to Support Its Ultimate Conclusions

Appellants assert that the report of the Commission herein failed and refused to find that the existing coastwise services from and to Houston and Galveston, Texas, are inadequate; but, as a matter of fact, found to the contrary. Appellants also criticize the Commission's report for failing to find that the institution of service by the appellee, Pan-Atlantic Steamship Corporation, would endanger and impair the operations of the existing carriers, contrary to the public interest.

In the section of its report entitled "Discussion and Conclusions," the Commission reviewed and evaluated at length the considerations for and against the application of defendant-appellee, Pan-Atlantic. Instead of noting only those facts which supported its ultimate conclusions, the Commission's review and evaluation purposely and properly reflected full consideration of the contentions that had been advanced by each of the opposing parties. As the district court noted, the so-called "findings" that plaintiffs-appellants contend were made in its "Discussion and

Conclusions" by the Commission "are no more than pieces of the discussion surgically dissected from context."

The court found that *taken in context* the discussion in the Commission's report clearly expresses its findings and conclusions that (1) the existing service is inadequate, and (2) the proposed service will not endanger or impair the operations of existing carriers. With respect to point (1), the court's opinion makes reference to the definite and conclusive statements in the Commission's report that the existing services are inadequate, although the court notes that in all fairness the Commission's report also refers to the contrary evidence on the point. Likewise, the court refers to the Commission's discussion of whether there is room in the trade for another carrier, and points out that, except for isolated statements taken from context and labeled by appellants as "findings," the Commission's report has clearly conveyed the idea that the proposed service of Pan-Atlantic Steamship Corporation will not endanger or impair the operations of the carriers already in the trade. As the court stated, "To draw a contrary conclusion, in the light of the report, would be to indulge in a presumption that the Commission disregarded the public interest. Cf., *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515."

Appellants assert that the district court indulged in speculation and the drawing of inferences from negative facts, and even lack of evidence in the record, to justify the conclusions reached, specific reference being had to the Commission's findings with respect to the fitness and willingness of Pan-Atlantic to operate the proposed service. Contrary to appellants' contentions, however, the court specifically found that there is an "abundance of supporting evidence in the record" to support the Commission's finding that the applicant is fit, willing, and able to perform

its proposed service, and noted specific references in the Commission's report to Pan-Atlantic's adequacy of financial position, equipment, facilities, experienced personnel and record of past operations in the coastwise trade. (285 I. C. C. 33, 50) Appellants have contended that because Pan-Atlantic does not exercise all of the operating authority which it holds from the Commission, it can not be found to be fit and willing to exercise the particular authority now sought. However, the district court noted that the Commission had considered this argument and found that it did not require the finding that applicant is not fit or willing to perform the operation for which it here seeks authority. As the court said, "Though phrased negatively, the statement is nevertheless a finding of fitness and ability, if not upon its face, then at least by reasonable implication, and certainly when read in context. Nor is this finding precluded by the record."

For the foregoing reasons, and for those set forth in Motion to Affirm filed by appellees United States of America and Interstate Commerce Commission, it is evident that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the district court should be affirmed.

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Counsel for Appellee,
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Dated: November 12, 1952.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 458

NEWTEX STEAMSHIP CORPORATION AND SEA-TRAIN LINES, INCORPORATED,

Appellants,

vs.

THE UNITED STATES OF AMERICA AND INTER-STATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT BY APPELLEES, HARRIS COUNTY HOUSTON SHIP CHANNEL NAVIGATION DISTRICT, THE CITY OF GALVESTON, THE BOARD OF COMMISSIONERS OF THE GALVESTON WHARVES, AND INTERVENING SHIPPERS, IN SUPPORT OF MOTION TO AFFIRM.

HAROLD B. FINN,
JOHN C. WHITE
Counsel for Appellees.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 73-60

NEWTEX STEAMSHIP CORPORATION AND SEA-TRAIN LINES, INCORPORATED,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

STATEMENT BY APPELLEES, HARRIS COUNTY HOUSTON SHIP CHANNEL NAVIGATION DISTRICT, THE CITY OF GALVESTON, THE BOARD OF COMMISSIONERS OF THE GALVESTON WHARVES, AND INTERVENING SHIPPERS, IN SUPPORT OF MOTION TO AFFIRM.

Come now Harris County Houston Ship Channel Navigation District, the City of Galveston, the Board of Commissioners of the Galveston Wharves, the Atlantis Sales Corporation, Frankfort Distilleries, Incorporated, Magnolia Petroleum Company and Magnolia Pipe Line Company, Phelps Dodge Corporation, Converted Rice, Inc., the Sherwin-Williams Co., Congoleum-Nairn, Inc., Lone Star Bag and Bagging Co., and Sears, Roebuck & Company, and file this memorandum in support of Motion to Affirm filed by the United States of America and the Interstate Commerce Commission. These appellees are the ports and

shippers which were granted leave to intervene as defendants in support of the order of the Commission giving Pan-Atlantic Steamship Corporation authority to extend its service to the ports of Houston and Galveston.

The Commission's Findings Supported by Substantial Evidence Establish the Public Need for the Proposed Additional Service and the Availability of Traffic to Sustain Regular Dependable Service.

The inadequacy and even the non-existence of the existing service and the need for additional service is shown by the following findings of the Commission:

> "Galveston, the oldest port on the Gulf, west of New Orleans, has no Atlantic-Gulf Coastwise service." 285 I. C. C. 36.
>
> "Galveston has extensive port and terminal facilities great quantities of cargo move through that port in foreign and exempt domestic transportation, and its facilities are well adapted efficiently and economically to handle coastwise general cargo. It is now without berth service in the coastwise trade." 285 I. C. C. 50.
>
> "Seatrain's service is prompt, reliable and efficient, but because of the conditions under which it operates, there are many shippers who cannot use its excellent service." 285 I. C. C. 37.
>
> "Applicant's contentions with respect to the availability of traffic within the affected area and the public need for additional break-bulk water service are supported by the Boston Port Authority, Chamber of Commerce of Philadelphia, Rochester Chamber of Commerce, Shippers' Conference of Greater New York, Associated Industries of New York State, Inc., Houston Port and Traffic Bureau, Inc., Houston Chamber of Commerce, Galveston Cotton Exchange and Board of Trade, Galveston Chamber of Commerce, Board of Trustees of the Galveston Wharves, Fort Worth Chamber of Commerce, Fort Worth Grain & Cotton Ex-

change, Southwestern Peanut Sellers Association, Texas Cotton Seed Crushers Association, Texas Industrial Traffic League, and other shipper groups and individual shippers." 285 I. C. C. 42.

"Shippers witnesses testifying in support of the application represent some 35 concerns. * * * For various reasons, discussed below, they find the existing coastwise service inadequate. * * * They complain, on the other hand, of various shortcomings encountered in the services of both Seatrain and Newtex." 285 I. C. C. 44-45.

"Seatrain serves no Atlantic coast port except New York." 285 I. C. C. 45.

"We agree, however, with their view that fortnightly sailings south-bound from Boston and weekly from Philadelphia and Baltimore constitute rather scant service, and during the 1949 steel strike this schedule was restricted even more severely. The hampering effect of such limited service has been aggravated, moreover, by the repeated failures of Newtex vessels to sail on schedule and by the numerous outright cancellations of sailings where the available tonnage was considered insufficient to warrant dispatch of the vessel." 285 I. C. C. 46.

"Disregarding these and certain other similarly vulnerable criticisms of existing services, there remains substantial evidence that protestants' services do not fully meet the needs of shippers and that extension of applicant's operations as proposed would improve the situation." 285 I. C. C. 48.

"Its (Newtex) actual sailings have not conformed to the advertised sailing dates, many were canceled, and because of its primary reliance on steel tonnage, sailings were severely curtained in the last quarter of 1949 because of the steel strike." 285 I. C. C. 48.

"Notwithstanding the advantages provided by Seatrain's service, it too fails in some respects to meet the needs of the shippers here concerned. Shippers of low-grade traffic or of commodities not susceptible to heavy loading are discommoded by a tendency toward

'selectivity,' evinced at least occasionally by this carrier, and it offers no accommodations for shippers of less-than-carload lots. We are constrained, also, to agree that shippers at or adjacent to ports other than New York are entitled to service through the ports to which they are logically tributary, if such service is economically feasible." 285 I. C. C. 48-9.

That the existing traffic potential is high and that additional traffic can be attracted by regular, dependable and reasonably frequent sailings, which the additional service will provide, is established by the following findings of the Commission:

"While the prewar tonnage cannot be regarded as a true measure of the present traffic potential, we cannot escape the conclusion that the potential has not declined in the proportion that the existing coastwise service bears to that in operation prior to the war, and consequently that the volume at present moving in this trade is not to be regarded as the maximum available for coastwise transportation." 285 I. C. C. 49.

"We share the view of applicant and a number of its supporting shippers that a break-bulk line providing regular, dependable, and reasonable frequent sailings will engender confidence and reliance upon coastwise service and attract additional traffic. Where sailings are relatively infrequent, and especially where they are not operated in substantial comformity with advertised sailing dates, an increase in the frequency of service reasonably may be expected to increase the volume of traffic in greater measure than the proportionate increase in frequency of service. Applicant is of the view that a vigorous solicitation program will aid materially in building up a substantial traffic volume, and the increasing patronage of its existing service lends support to this view." 285 I. C. C. 49-50.

That substantial evidence before the Commission clearly sustained its findings is shown by its report, and the appel-

ant's position can only be interpreted to be that its findings were not in accord with the weight of the evidence. The Court properly held that in its review it was confined to the question of "whether there is substantial evidence to support the basic findings." *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 315, (1946). It found that substantial evidence recited upon the very face of the report of the Commission.

Appellants are asking the Court to assume the function of guardian of the public interest entrusted by Congress to the discretion of the Commission. *United States* v. *Detroit and Cleveland Navigation Company*, 326 U. S. 236 (1945).

In effect, appellants are asking this Court to deny any coastwise service whatever to the Port of Galveston, which has millions invested in port facilities and whose whole economy is dependent upon its port operations.

They are asking this Court to find, contrary to the judgment of the Commission, that Houston must be content with two sailings northbound per month and one each week southbound from New York, Philadelphia and Baltimore, compared to 9 coastwise sailings each week before the last war, when potential traffic was much less. Even this scant service, justifiably so-called by the Commission, is aggravated by failures to sail on schedule and outright cancellations.

Contrary to the law and to the findings of the Commission, they ask this Court to find that the ports of Houston and Galveston, with their tremendous industrial development and population increase, must be content with Seatrain Service from Edgewater, New Jersey, to Texas City, a competitive port. Excellent for much traffic, Seatrain Service is inadequate for reasons clearly stated in the report. Only New York is served on the Atlantic Coast and only Texas City in Texas; no less-than-carload traffic is handled;

space has been inadequate and a permit system is used with light loading and low grade commodities discriminated against.

Pan-Atlantic, when the authorization of the Commission is permitted to become effective, will provide one additional sailing each week between Houston and Galveston and Boston, New York, Philadephia and Baltimore. Its judgment is that the service is needed and can be remunerative, and the Commission so found.

Pan-Atlantic will, for the first time since the war, provide a limited coastwise passenger service with space for ten to twelve passengers, a service which is in constant request. Appellants can scarcely complain of this. They offer no such service.

The eight substantial shippers who have intervened in this proceeding and some forty others who testified before the Commission, believe that Pan-Atlantic's service is required in their own operations, and that its institution, making regular, dependable and more frequent sailings available, will result in a substantial increase in coastwise tonnage, to the benefit of both appellants and the communities and shippers. The Commission so found.

An almost casual reading of the report and order will show that the Commission has made all necessary ultimate and evidentiary findings required. Competent evidence supports those findings, and the Commission, not the courts, has been empowered to determine the questions the appellants present, and has determined them.

The original application to extend service to Houston and Galveston was filed April 3, 1950, and after extended hearing and consideration the case was decided by the Interstate Commerce Commission on August 9, 1951. Petition for reconsideration was denied by the Commission on December 10, 1951, and a second petition on January 24, 1952.

The judgment of the District Court was entered October 3, 1952, and the order allowing this appeal and continuing the injunction issued October 6, 1952. The Ports of Houston and Galveston, with many millions invested in port and terminal facilities, and the intervening shippers, continue to lack the service to which the Commission has found they are entitled.

The motion to affirm should be granted.

Respectfully submitted,

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Dated: November 12, 1952.

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Supreme Court of the United States

Term 1952

No. — 458

NEWTEX STEAMSHIP CORPORATION and SEATRAIN LINES, INCORPORATED,

Plaintiffs-Appellants,

against

THE UNITED STATES OF AMERICA, *et al.*,

Defendants-Appellees.

BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

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Supreme Court of the United States

Term 1952

No. ——

NEWTEX STEAMSHIP CORPORATION and SEATRAIN LINES, INCORPORATED,

Plaintiffs-Appellants,

against

UNITED STATES OF AMERICA, *et al.*,

Defendants-Appellees.

BRIEF OF APPELLANTS IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM

Statement

The sole ground upon which the appellees move to affirm the judgment of the District Court is that no substantial Federal question is presented. Although the Jurisdictional Statement filed by appellants sets forth the principal issues involved upon which it is contended that the questions presented are substantial and upon which it is believed that the Decree of the Lower Court should be reversed, submission of this brief is deemed justified and

may be helpful to the Court in clarifying and understanding the misconceptions which appear in the appellees' motion to affirm.

Facts

The Lower Court Decree dismissed an action instituted by appellants to set aside an Order of the Interstate Commerce Commission.

By application filed April 3, 1970, the appellee, Pan-Atlantic Steamship Corporation, a common carrier by water, sought authority in competition with appellants to serve Houston and Galveston, Texas, in connection with and as an extension of its presently authorized operations between specific Atlantic and Gulf ports.

The Pan-Atlantic Steamship Corporation possesses authority to engage in 81 distinct water carrier services between 14 named ports. At the time of the oral argument before the Commission the said appellee had either failed to initiate or refuse to continue to maintain 35 distinct services for which it had been granted operating authority (pp. 951, 952, Commission Record).

The report of the two Commissioners, constituting the majority in favor of granting the said appellee's application, stated in part:

> "• • • Considering only the volume of coastwise tonnage currently moving to and from Texas, an additional line in this trade clearly would be unwarranted. Seatrain's competitive position seems secure, but a break-bulk service paralleling that now provided by Newtex may be expected to divert a part of the traffic now moving by that line. After substantial

> deficits in 1947 and 1948, Newtex realized modest profits in 1949 and 1950. Unless a substantially larger overall volume of coastwise tonnage can be developed, extension of applicant's operations probably would force Newtex into a deficit and conceivably retirement from the trade."

In coming to the conclusion that the said appellee was entitled to extend its operations, the majority report of the Commissioners relied on the additional service recently provided by one of the appellants, to which it added for support the *view* of the said appellee, Pan-Atlantic Steamship Corporation "that a vigorous solicitation program will aid materially in building up a substantial traffic volume", and the fact that the appellee had adequate equipment, facilities, personnel and finances "together with its past operations in the coastwise trade." (Sheets 15-16, Commission Report.)

The dissenting opinion of Commissioner Cross, however, found:

> "I dissent from the finding that the present and future public convenience and necessity require extension of applicant's presently authorized operations so as to include Houston and Galveston.
>
> Considering only the volume of coastwise tonnage currently moving to and from Texas, an additional line in this trade would be unwarranted. Therefore in order to justify the additional authority sought, there must be a clear showing that sufficient new tonnage can be developed to warrant the proposed additional operations. Applicant's evidence concerning the anticipated new tonnage to and from the Texas ports, in my judgment, is not sufficiently definite to

warrant the granting of the application. The majority here express the view that 'unless a substantially larger over-all volume of coastwise tonnage can be developed, extension of applicant's operations probably would force Newtex into a deficit and conceivably retirement from the trade.'

While applicant is here seeking authority to perform additional operations, the record shows that it does not now perform all the service for which it has operating authority. For example, it does not maintain service to or from Charleston; between Baltimore and Philadelphia, on the one hand, and Pensacola, on the other; between Boston, on the one hand, and New York, Philadelphia, and Baltimore, on the other; or from North Atlantic ports to Georgetown, S. C.

In my opinion, applicant is not entitled to the additional authority sought because it has failed to establish as required by the statute that the proposed service is or will be consistent with the public interest and the national transportation policy." (Sheet 17, Commission Report.)

Although the majority opinion of the District Court held that the ultimate conclusion of the Commission was based upon substantial evidence to support the basic findings, a vigorous dissenting opinion took the opposite view.

The dissenting opinion held that the basic findings made by the Commission were that (a) an additional line was unwarranted considering the current volume of coastwide tonnage; (b) a break-bulk service paralleling that of appellants may be expected to divert part of its traffic;

(c) appellant, Newtex, had substantial deficits in 1947 and 1948 and modest profits in 1949 and 1950; and (d) "unless a substantially larger overall volume of coastwise tonnage can be developed, extension of applicant's (Pan-Atlantic) operations probably would force Newtex into a deficit and conceivably retirement from the trade." These findings, the dissenting opinion held, show clearly that present public convenience and necessity was not served by the extension of authority granted to appellee, Pan-Atlantic.

The dissenting opinion in the Court below further held that the conclusion that future public convenience and necessity would be served was not supported by the basic findings, which were to the effect only that (a) the appellants' services do not fully meet the needs of shippers and the extension of operations sought *"would improve the situation"*; (b) "a break-bulk line providing regular dependable and reasonably frequent sailings will attract *additional* traffic"; (c) the view that "a vigorous solicitation program will aid materially in building up substantial traffic volume". As stated in the dissenting opinion, the last finding "can be accomplished by merely taking over the traffic now handled by Newtex and thus driving it out of business".

Issues

The issue presented by this appeal is whether the Commission's ultimate conclusion that the appellee Pan-Atlantic Steamship Corporation was entitled to the certificate extending its operations because "it is or will be required by the present or future public convenience and

necessity'' was founded upon adequate basic findings which are in turn supported by substantial evidence in the record.

Argument

Clearly this appeal can have no purpose to delay and no contention with respect thereto is made by the appellees. It is equally clear that questions of grave importance to the nation are presented for decision.

A certificate of public convenience and necessity may be issued under section 309(c) of the Act only when there is proof of public convenience and necessity. The term ''public'', so used, related not merely to the inhabitants of a particular city, state or geographical area but rather to the entire citizenry of the United States. *Interstate Commerce Commission* v. *Railway Labor Executives Ass'n.*, 315 U. S. 373, 377. While the needs of particular areas or classes of shippers must be given consideration, those needs must be viewed in the light of the much broader national sphere. *Colorado* v. *United States,* 271 U. S. 153, 168. The prime and ultimate consideration involved in the maintenance of an efficient national transportation system is the national interest.

The Congressional Mandate to the Commission, stated in the National Transportation Policy, is to ''foster sound economic conditions in transportation and among the several carriers'' and to prevent ''unfair or destructive competitive practices.'' It must be carried out in the administration of the Act and in the certification or refusal to certify proposed common carrier service by water. *Eastern Central*

Motor Carriers Association v. *United States*, 321 U. S. 194; *Barrett Line, Inc.* v. *United States*, 326 U. S. 179; *I. C. C.* v. *Parker*, 326 U. S. 60; *American Trucking Association* v. *United States*, 326 U. S. 77; *War Shipping Administration, T. A. Application*, 260 I. C. C. 589, 592. Accordingly, the national interest is of paramount importance in finding or failing to find the existence of "public convenience and necessity."

Unnecessary duplication of facilities is an economic waste, prejudicial to the national interests, *Purcel* v. *United States*, 315 U. S. 381; *Proposed Construction by Piedmont & Northern Ry. Co.*, 138 I. C. C. 363; *Construction of Branches by Pittsburgh, L. & W. R. Co.*, 150 I. C. C. 43, however desirable to the duplicator or new carrier. Accordingly, even in the absence of objection by competing carriers, waste arising from unnecessary duplication is not permitted. *Construction of Line by Southern Kan. I. B. Ry. Co.*, 117 I. C. C. 210; *Motor Vanway, Inc.*, 17 M. C. C. 314.

It becomes evident from a review of the report of the Commission that there was and is adequacy of existing service sufficient to meet the public requirements At Sheet 15 of the report it was indicated: "Considering only the volume of coastwise tonnage currently moving to and from Texas, an additional line in this trade clearly would be unwarranted." This is merely another way of saying that the existing service is adequate and provides all of the transportation required by the trade. This finding inexorably demanded and required the concurrent finding by the Commission that the proposed service would create "unnecessary duplication of facilities" which "is an economic waste, prejudicial to the national interests."

As the Supreme Court stated in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 471, 474, "regulation (of railroads) involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures, which are unnecessary if free competition is to be permitted." Elimination of unwarranted and therefore wasteful competition is sought, even though existing carriers are thereby protected in the status quo, because "undue competition should not weaken all to the detriment or destruction of the quality and extent of the service to which the public was entitled." *Byers Transportation Co.*, 49 F. Supp. 828, 829. To allow new operators to enter a field in competition with existing operators who are furnishing adequate, efficient and economical service would jeopardize sound economic conditions among the carriers which the Commission is required by the National Transportation Policy to maintain in the public interest. *Clark Common Carrier Application*, 1 M. C. C. 445, 448; *Miller Extension of Operations*, 27 M. C. C. 731, 735.

In discussing the general policy of the Act, which requires protecting existing carriers from new competition, the Supreme Court summarized the problem as follows:

> "It (Congress) recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall on the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it

may be the public which ultimately bears the loss (citing cases). The act sought, among other things to avert such losses."

* * *

"* * * where the proposed trackage extends into territory not theretofore served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are, under the new policy of Congress, of national concern. For invasion through new construction of territory, already adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. * * *" *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & S. F. Ry. Co.*, 270 U. S. 266, 277, 278.

"One of the most important duties of public regulation, indeed, is to bring transportation competition under proper control" since competition which goes beyond reasonable bounds is both wasteful and destructive in its results. *Missouri Pacific Transportation Co.*, 9 M. C. C. 712, 718.

In line with this principle and the underlying policy of the Act, the Commission has established the doctrine that existing carriers should normally be accorded the right to transport all the traffic they can handle adequately, efficiently and economically in the territory served by them, without the competition of a new service. *Contract Carriers, Inc.*, 41 M. C. C. 165, 170; *McCoy Truck Lines, Inc. Extension*, 26 M. C. C. 585, 589; *Holland Transportation Co. Extension*, 33 M. C. C. 558, 569; *Construction of Branches by Pittsburgh, L. & W. R. Co., supra.*

The existing carriers, unquestionably, can handle all traffic available at the ports which they are certificated to

serve. If there be augmentation of traffic in the future from and to such already certificated ports, these carriers not only are willing, ready and able to handle it but the construction of new Seatrain vessels offers adequate insurance as to their ability to handle that traffic. The law clearly requires that the existing lines be given the opportunity to augment and expand their service, as and if required, to meet any new or enlarged public need before the Commission certificates any new or additional service.

Competition is not justified at the price of wasteful or duplicate facilities or services. Public convenience and necessity may adequately be served by even a single existing carrier. When two competing carriers are available to the shipper, no question of monopoly arises. *Sabin Basin Ry. Co.*, 170 I. C. C. 653, 674. Even when service is provided by only a single carrier, there is no reason to admit a new carrier to the field merely to provide competitive service. *The Rock Island Motor Transit Company*, 33 M. C. C. 349, 357; *Brundage Common Carrier Application*, 11 M. C. C. 187, 190; *Construction by Aroostook Valley R. R.*, 105 I. C. C. 643; *Consolidated Motor Lines, Inc., Extension*, 18 M. C. C. 35, 44.

As pointed out in the Jurisdictional Statement filed by the appellants this appeal involves the deprivation of the property interest of the appellants and the avowed public policy of encouraging a National Maritime Service. The Commission's ultimate conclusions in the instant case are without evidentiary support and are contrary to its own basic findings as is definitely and distinctly set forth in both the dissenting opinion contained in the Commission's Report and in the Dissenting Opinion of the Court below.

CONCLUSION

The motion to affirm should be denied in order that this Court may pass upon the important issues here presented.

Respectfully submitted,

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By S. S. Eisen

(GP—9472)

Certificate of Service

I certify that the foregoing Brief of Appellants in Opposition to the Motion to Affirm was served upon counsel for the parties in the case of *Newtex Steamship Corporation and Seatrain Lines, Incorporated* v. *United States of America, et al.*, Civil No. 73-60, United States District Court for the Southern District of New York, by mailing a true copy of said Brief to such counsel this 10th day of November, 1952.

S. S. Eisen,
Counsel for Plaintiffs-Appellants.

No. 458. NEWTEX STEAMSHIP CORP. ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Southern District of New York. *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. *S. S. Eisen* for appellants. *Acting Solicitor General Stern* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission; *Harold B. Finn* and *John C. White* for the Harris County Houston Ship Channel Navigation District et al.; and *Mr. Finn* and *Warren Price, Jr.* for the Pan-Atlantic Steamship Corporation, appellees. Reported below: 107 F. Supp. 388.